UNITED STATES OF AMERICA

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1941

No. .....

GAMBOA, RODRIGUEZ, RIVERA & CO., INC.,
Petitioner,
versus
IMPERIAL SUGAR COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion rendered in this cause in Circuit Court of Appeals for the Fifth Circuit (R. 135-139) is reported in 125 Fed. (2d) 970.

II

Jurisdiction Disclosed by the Record

1. The date of the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, affirming the judgment of the District Court for the Southern District of Florida, is the 25th day of February, 1942.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 347 of Title 28, United States Code (Section 240 of the Judicial Code of the United States), as amended by Chapter 229 of the Acts of Congress of February 13th, 1925.

3. The nature of the case and of the rulings below relied upon by petitioner as bringing this case within the jurisdictional provision relied on, have been fully stated in the petition at pages 6 to 8, supra, with appropriate references to the record, which statement is hereby adopted and, for the sake of conciseness, is not here repeated.

4. The cases believed to sustain such jurisdiction are as follows:

Magnum Import Co. vs. *Coty*, 262 U. S. 159; 67 L. Ed. 922; 43 Sup. Ct. 531;
Lamborn v. *National Bank of Commerce of Norfolk*, 276 U. S. 469;
Forsyth v. *City of Hammond*, 166 U. S. 506, 17 Sup. Ct. 665;
Jacob v. *The City of New York, supra;*
Aetna Ins. Co. v. *United Fruit Co.*, 304 U. S. 430;
Gulf Ref. Co. v. *Atlantic Ins. Co.*, 279 U. S. 708;
Queen Ins. Co. v. *Globe Ins. Co.*, 263 U. S. 487.

III

Statement of the Case

This has been sufficiently covered in the preceding petition, pages 1 to 5.

Specification of Errors

1. The Circuit Court erred in stating and holding that no cases were cited or had been found dealing with a situation of this kind, but that the principles of "fair play" justified the affirmance of the judgment.

This Court has stated the principles governing a c. i. f. contract as follows:

> "The requirements of exportation are reflected in the familiar 'C. I. F.' contract (that is, at a price to cover cost, insurance, and freight), which has 'its recognized legal incidents, one of which is that the shipper fulfils his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and policy of insurance with a credit note for the freight, as explained by Lord Blackburn in Ireland *v.* Livingston' (L. R. 5 H. L. 395, 406). Ströms Bruks Aktie Bolag *v.* Hutchison (1905) A. C., 515, 528."
>
> *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19 at p. 26.

If, as this Court has said, the seller fulfills the c. i. f. contract by forwarding a "credit note" for the freight, in exchange of which he receives the full purchase price, the logical result is that when the "freight" represented by the "credit note" is rebated, the rebate is made to the seller.

The Courts below have here turned a c. i. f. contract into a c. and i. contract. There is not the slightest justification for re-writing the c. i. f. contract between the parties so as to transfer the "f" clause from the seller to the buyer.

In addition to the *Thames & Mersey* case, petitioner cited at least a dozen cases, including

Ireland v. *Livingston*, L. R. 5 H. L. 395

defining the rights, duties and responsibilities of the various parties to and under a c. i. f. contract. Furthermore, petitioner cited the very recent English case,

Finska Cellulosaforeningen (Finnish Cellulose Union) v. *Westfield Paper Company, Ltd.*, (supra)

which dealt with the precise situation that confronted the parties in this litigation: namely, an interruption of the contemplated voyage by outbreak of war, where the carriage of the goods was in performance of a c. i. f. contract. In that case the Court of King's Bench followed the accepted and settled principles governing c. i. f. contracts as laid down by American and British Courts in

Thames & Mersey Ins. Co. v. *United States, supra*

and

Ireland v. *Livingston, supra.*

Moreover, the factual situation in the *Finska* case was almost identical with that presented by the record here and the determination arrived at by the Court of King's Bench was the same as that for which the petitioner here contends; namely, the awarding of the freight money to the seller (petitioner). It was error, therefore, for the Circuit Court to state and hold that this case was without precedent, merely because there was no American precedent.

Furthermore, it was a departure from the accepted and usual course of judicial proceedings for the Circuit Court of Appeals to justify its affirmance of the trial court on principles of "fair play" instead of upon recognized applicable principles of law and equity and controlling decisions and precedents of this and other courts of recognized authority.

It has been the boast of American civilization that it is founded on a "government of laws and not of men"; that our courts interpret statutes and do not write them; that judicial proceedings were determined by established rules and precedents and not the caprice of judges.

Whatever value the rules of "fair play" may have in the realm of sports it is a novelty to have judgments based upon them. Litigants, specially merchants, bankers, insurers, ocean carriers, etc should be able to rely and conduct their business upon the law of the land as judicially construed and interpreted by our courts. Neither they

nor the vast commerce and business of the nation should be at the hazard of the elastic rules of fair play. Commerce, industry and labor, the rich and the poor, farmer and city dweller, are alike entitled to the protection of the law of the land as judicially construed by the courts. The meaning of judicial construction, like sound discretion of a court, is so well understood, as not to require any further elaboration before this Court. In essence, it simply means that the prejudices, frailities and caprices of the judge or justice as a mere human being, shall not be permitted to sway or control the interpretation of the law. Thus it was error for the Circuit Court of Appeals for the Fifth Circuit to base its affirmance of the trial court on the principles of "fair play" instead of on recognized judicial precedents, particularly where there was a cogent and persuasive authority on an analogous situation in an English Court of high repute. (See argument, infra, pp. 24-26, 28.)

2. The Circuit Court of Appeals for the Fifth Circuit erred in stating and finding that the petitioner had, "in fact, realized every cent it expected to receive or to which it was entitled under the contract." This statement is not in accordance with the admitted facts as disclosed by the Record. The expression is taken from the respondent's brief in the court below. The adoption by the Circuit Court of Appeals of this superficial generality, establishes beyond question that the Court failed to analyze the situation and thus erred as a matter of law in affirming judgment.

The error of the Circuit Court of Appeals is probably best exemplified by its inconsistency in determining to decide this case and affirm the judgment below on the alleged realization by the petitioner of its expectations, while at the same time calling the fund in the Registry of the Court a "windfall".

Webster defines "windfall" as "unexpected good fortune".

It was respondent who first used the term to describe the sum in controversy. The petitioner, in its reply brief

below, welcomed this characterization. Thus the parties were in complete agreement as to the nature of the controverted fund.

The Circuit Court of Appeals refers to it as an "unexpected windfall", a redundancy, but nevertheless an expression of accord with the parties. Notwithstanding this complete agreement that the subject of the litigation was a "windfall", and thus a sum which neither party to the contract could ever reasonably have expected to receive, the Circuit Court of Appeals awards the amount to the respondent on the ground that the petitioner had received all that it had "expected to receive".

If the expectations of the parties to the contract were the criterion of the decision, we might with truth point out that if the respondent had paid the purchase price in full, it was only paying what it had expected to pay. But it did not pay in full the agreed purchase price.

To demonstrate that the petitioner has not, in fact, realized every cent it had *expected* to receive and that the respondent has not paid in full the purchase price which it had *expected* to pay, we summarize the admitted facts.

Petitioner had sold and respondent had bought a large quantity (10,000 Tons) of sugar, c. i. f. Philippine Islands. Petitioner expected to arrange and pay for the shipment of the sugar to destination, in monthly lots, insure each against marine and war risk perils to destination and expected, in return for the documents evidencing each transaction, to be paid the agreed purchase price. Respondent expected to pay the full purchase price in exchange for these documents.

Petitioner, instead of itself prepaying the freight, authorized the respondent to discharge part of its debt (the purchase price) to petitioner by discharging petitioner's debt for the ocean freight in full to the carrier; or to state it another way, petitioner constituted the respondent its agent to use part of the purchase price which respondent owed petitioner, for the purpose of paying the carrier the

freight. In either event, it only authorized the respondent to pay the freight if it was *earned* by the carrier. That was the normal and reasonable expectation of both the parties.

But the unexpected happened. Events occurred beyond the control of the parties. War broke out in Europe. The vessels carrying the cargoes took refuge in neutral ports. None completed its voyage to the agreed destination. Thus none *earned* the freight because the contract of affreightment being entire, requires the completion of the contract voyage before the freight is earned.

> *The Gracie D. Chambers,* 253 Fed. 182 C. C. A. 2nd Cir.

Interrupting the voyage half way does not entitle the carrier to half freight.

The carrier, however, did not breach its contract, because the bills of lading evidencing the affreightment contract permitted the vessels to take refuge under the circumstances which had arisen.

Therefore, while the situation confronting these litigants was unexpected and a variation from their normal commercial intercourse, because the cargoes did not arrive at destination, the situation was not unprovided for, since the bills of lading authorized the termination of the voyages at ports of refuge in such circumstances, and the marine and war risk policies which had been delivered to the respondent by the petitioner amply covered the respondent for whatever risk, hazards or expenses it thereby incurred.

Notwithstanding that the carrier had not earned the freight, it demanded it; and in one instance, (the S/S "Wasgenwald",) the petitioner, and in the other four cases, the respondent, paid the contract freight to the carrier and took delivery of the cargoes.

Both petitioner and respondent then sued the carrier Hamburg, for the full amount of the freights paid, $32,541.75. Confronted by conflicting demands for the same sum of money and recognizing that in demanding the freight

it had wrongfully exacted it (because unearned), the carrier paid the money into the Registry of the Court, thus discharging itself of the conflicting claims, which were submitted to the judgment of the District Court.

This recital makes it clear, we think, why this refund of unearned freight is a "windfall" and why the "windfall" belongs to the petitioner. If petitioner had prepaid the freight, as it might have done, when the voyages began in the Philippines, and the same interruption had occurred, can there be any doubt that, in the absence of a contrary bill of lading provision, the carrier would have repaid the amount to the petitioner as unearned freight? Would there have been in such circumstance, any ground for the respondent believing it had any right to the refund, or any faintest suggestion that would authorize the carrier refunding it to the respondent?

Undoubtedly, the circumstance which had misled the Trial Court, as well as the Circuit Court of Appeals, was that in four out of the five instances the respondent physically made the payment of the freight. Both Courts, however, overlooked the undoubted fact that it was the petitioner's money which respondent used in making the payments to the carrier which the carrier has since refunded. For whether we regard the respondent as acting as the petitioner's agent and paying the carrier with the petitioner's funds; or whether we regard the respondent as having been authorized by the petitioner to discharge in part respondent's debt to the petitioner (the purchase price) by paying in full and thus discharging petitioner's debt to the carrier (the freight); in either event, the payment was made by the respondent as part of the purchase price owing by it to the petitioner.

Now unquestionably, if the freight had been earned and the carrier had been justified in retaining it, the expectations of both the petitioner and the respondent would have been fulfilled. Petitioner would have received the purchase price which it had bargained for (although part of it had

been paid by respondent to discharge petitioner's debt to the carrier) and respondent would have paid in full the agreed purchase price.

But the *unexpected* occurred. The carrier paid back into the Court the freight which it had wrongfully exacted; hence, it is properly defined as a "windfall". But it cannot, on any legal or equitable ground be awarded to respondent. Being part of the purchase price wrongfully withheld from the petitioner, it becomes petitioner's property when the wrongdoer who exacted it disclaims it. The Courts below were influenced to commit error by circumstances which ignored the true character of the "windfall". The Trial Court awarded the entire "windfall" to the respondent on the wholly fallacious theory that it belonged to whoever had made the payment to the carrier, regardless of the ownership of the money used to make the payment. Although aware that the payments were made $27,398.25 by respondent and $5,143.50 by petitioner (R. 136, 137), the trial court's decree did not follow its reasoning, and both the decree and the reasoning were erroneous (R. 80-90).

The Circuit Court of Appeals erroneously affirmed the judgment, not on the theory which had influenced the Trial Court, but on the equally erroneous finding that petitioner had been paid in full the agreed purchase price under the contract.

3. The Circuit Court of Appeals for the Fifth Circuit erred in disregarding the rights and responsibilities of the parties to a c. i. f. contract as laid down by this Court in

Thames & Mersey Ins. Co. v. *United States,* supra

and numerous other decisions and awarding the "windfall" to the respondent because the respondent claimed to have suffered the expense, risk and inconvenience incident to the transshipment of the undelivered cargoes; this, in the face of the express stipulation in the record that both petitioner and respondent had fully performed their obligations under the c. i. f. contract.

That finding of complete performance by the petitioner as the seller under a c. i. f. contract, necessarily excluded breach of contract or failure to perform it. Thus there admittedly has been no breach or failure to perform on the part of the petitioner, and the "expense, risk and inconvenience" claimed to have been suffered by the respondent cannot be made the excuse for awarding the "windfall" to the respondent as some form of damages or compensation for said "expense, risk and inconvenience".

Obviously, the Circuit Court was greatly influenced in favor of the respondent by the reiterated insistence in its brief below of the great expense of transshipment, notwithstanding that at the trial it had expressly disclaimed the existence of those expenses as a ground for its right to the refund (Rec. 101).

Surely the mere accident of the convenience or inconvenience of the ports of refuge should not alter or affect the basic principle of a c. i. f. contract. When war began in September, 1939, thousands of ships went to ports of refuge. Some were just a step from their contract destinations. Some were in remote corners of the earth. It might well have chanced that one of these might have taken refuge at Vera Cruz, or even at Corpus Christi, so that transshipment to destination would have been relatively cheap and easy. Yet the law is strict (*The Grace D. Chambers,* supra) and well settled that collect freight is not payable unless ship and cargo reach destination—in these cases, Galveston. Surely the solution of this case cannot turn on the chance of the ports of refuge being convenient or inconvenient. If such be the law, this case should be sent back for further proofs and findings, for there is not enough in the record about inconvenience or the effect of war on prices.

When respondent perceived from the petitioner's brief that it could not hope to support the judgment of the trial court on legal grounds it directed all its efforts in the appellate court to sustaining the judgment on the ground of having suffered this "expense, risk and inconvenience". That

excuse, however, the petitioner demolished by showing that those very contingencies were fully considered and provided for in the marine and war risk insurance policies which the petitioner had secured, paid for, endorsed and delivered to the respondent.

On their face, these policies showed that they not only covered against said risks, the full invoice value of the cargo of sugar, but *the amount of freight payable upon arrival was separately and specifically insured* (Rec. 25, 35), so that if, by any chance or happening the respondent should not receive its sugar, but should, nevertheless, be legally liable for the freight, it would be fully indemnified by the insurance companies.

Not only did the petitioner show that respondent had received some $22,000. (Rec. 100) from the insurance underwriters, but that the respondent had sold the sugar in a market which had risen sharply after the outbreak of war and had doubtless received more profits than it had anticipated when it entered into the contract in 1938 (R. 96, 97).

It is difficult to say whether or not the Circuit Court fully adopted the petitioner's contention that all these so-called "additional expenses" claimed by respondent, were amply covered by the insurance policies of a face value of over $300,000. in sound companies, (although the contention was amply supported by precedents and authorities which the respondent did not even attempt to refute) because in its opinion, (Rec. p. 139) it says that the respondent "*with the insurance carriers* suffered the expense."

If the Circuit Court had adopted, as it properly might have, the petitioner's argument that discussion and consideration of these "expenses" was immaterial and irrelevant because the respondent was fully indemnified against those expenses by the policies, and by the further fact that petitioner concededly having fully performed its contract with the respondent could not be mulcted in damages for respondent's losses, even if it had not been thus indemnified, then there existed, as we have shown in "2." (supra) no legal ground for awarding the "windfall" to respondent.

But when the Circuit Court says, that respondent *with the insurance carriers* bore the expenses, it implies either that the respondent was not *fully* indemnified by the insurance or that the Court is uncertain where the burden of the expenses was laid. Neither of these alternatives is justified by the Record. The policies showed that they were ample in amount and the authorities in the petitioner's brief demonstrated conclusively—because they were not refuted—that the insurance provided for the very contingencies which confronted the respondent. Petitioner cannot be deprived of this "windfall" because the respondent, by its own admission, foolishly omitted fully to avail itself of its indemnity (Rec. p. 88).

If the respondent had not disclaimed on the trial its right to the sum in controversy on any theory of losses, damages or expenses, the petitioner would have been entitled, if that question were raised, to explore the whole subject matter with a view to determining whether in fact the so-called transshipment expenses represented a loss; the price which the respondent had obtained for the sugar; what its profits were on the re-sales and whether in fact these profits did not greatly exceed the transshipment expenses. But the respondent foreclosed these inquiries on the trial by resting its case on its so-called legal right to the refund regardless of whether or not it had suffered any so-called extraordinary expenses (Rec. 101).

It was only on the appeal to the Circuit Court of Appeals that respondent attempted to sustain the judgment below by recourse to this claim of expenses.

The Circuit Court of Appeals erred in not holding, on the authorities cited to it by the petitioner, that if there was in fact any such loss or damage as the respondent claimed, it was fully indemnified by the insurance policies.

St. Paul Fire & Marine Ins. Co. v. *Pacific Cold Storage Co.*, 157 Fed. 625, C. C. A. 9th Circ., cert. denied;

Wilson Bros. Bobbin Co. v. *Green* (1917), 1 L. R. K. B. Div. 860.

Argument

The decision of the Circuit Court of Appeals for the Fifth Circuit is embodied in the concluding paragraph of its opinion (Rec. p. 139), the balance of the opinion being devoted to a discussion of the facts.

Because it is so replete with error, we here quote it:

> "Appellant's position will not be sustained. Gamboa has, in fact, realized every cent it expected to receive or to which it was entitled under the contract."

(This sentence is lifted verbatim from the respondent's brief where the glib generalization is repeated several times in different form. We have shown in the Specification of Errors (2.) that it is at best but a half truth, but even if true, would not justify the expectations of the parties with respect to an unexpected happening making the deciding factor. There is and can be logically no expectation with respect to a purely fortuitous or adventitious circumstance).

> "It has been paid for the sugar and the insurance and has been relieved of its freight obligations."

(This, too, is another demonstratively erroneous statement. If, as this and many other courts have held, the c. i. f. contract price is a unit price, the petitioner has not been paid unless he has been paid *in full*. There can not be any separation, such as the Circuit Court attempts, of paying him for the sugar and for the insurance and relieving him of the freight obligation. This superficial generality ignores the very nature of the sum in controversy: viz, that it is a "windfall"; a sum of money which the petitioner expected to pay the carrier if it earned it; but not having earned it, and therefore not becoming entitled to it, the payor (petitioner) becomes entitled to it when it is refunded. This single sentence glaringly illustrates how the Court below

departed from the true and settled interpretation of a c. i. f. contract and the incidents to it).

> "When it shipped the sugar, and forwarded the proper documents to Imperial, its obligations under the contract were at an end."

(This is true as respects petitioner's obligation under a c. i. f. contract to the respondent, but not with respect to its contract with the carrier. It was still liable to pay the carrier if it earned the carriage. It contemplated carrying out that obligation by requiring, or permitting the respondent to pay the freight if and when it was earned out of the purchase price due to the petitioner. But the freight was never earned, although it was demanded and paid and later refunded. But it never lost its character as part of the purchase price and obviously due to the petitioner).

> "From that moment the buyer alone stood to lose on the ventures."

(Another excerpt taken from the respondent's brief below. The statement is wholly irrelevant and immaterial even if true. We might complete the sentence by saying "and it alone stood to gain by the ventures." But whether respondent gained or lost has nothing whatever to do with the determination of this case. Furthermore, there was no proof in the record that it lost on the venture. From the fact that it sold the sugar in the American market after the war had broken out, coupled with the fact, of which the Court will take judicial notice, that the price of sugar had increased sharply after that event, it was fairly inferable that the respondent made a handsome profit on the ventures and in addition it had $329,000. of prime insurance policies indemnifying it against marine and war risk hazards of the voyages. It has already collected over $34,000 from the carrier and the insurance companies (Rec. pp. 97-100) *besides the amount of this refund.*)

> "The buyer, Imperial, was the one who was interested in receiving the sugar at its agreed

> destination, and when the voyages were broken up, it paid the freight charges, and it with the insurance carriers suffered the expense, risk, and inconvenience incident to the transshipment of the undelivered cargoes."

(This statement, too, we have dealt with in Specification of Errors (3.) above. On the trial the respondent totally disclaimed any right to the sum in controversy on any theory that it was entitled to it as an offset of compensation against the trouble it had been put to in getting the sugar at the ports of refuge and stood squarely on the ground that it was entitled to it "legally, as a pure legal proposition" (Rec. p. 101). This disclaimer effectively prevented petitioner from inquiring fully into the question of whether or not respondent had, in fact, suffered any loss, expense or damage for which it was not fully compensated and indemnified. In the Circuit Court, however, perceiving that it could not support the judgment below as a "pure legal proposition", it appealed strongly to the so-called equities in the case, although their merits had not been inquired into at the trial. If, therefore, we read this sentence as a statement that the respondent suffered the inconvenience, and its insurance carriers the expense and risks, of the transshipment, we beg to point out that the insurance carriers are not here before the court and are not asking relief as subrogees of the respondent. These considerations, therefore, can have no bearing on the propriety of the judgment appealed from.)

> "No cases are cited, and we have found none dealing with a situation of this kind, but we think that the principles of fair play and justice sustain the judgment awarding the contested sum to Imperial."

We have criticized this sentence in Specification of Errors (1.) pointing out that not only did numerous decisions interpreting the c. i. f. contract, which we quoted

below, sustain our contention, but we cited an extremely pertinent decision recently rendered in the Court of King's Bench in England. Our further criticism was that the Circuit Court of Appeals based its affirmance, not upon recognized principles of law and equity, but upon the vague and elastic principles of "fair play".

This latter expression evidences such a departure from the accepted and usual course of judicial proceedings, or such a sanction for a departure by the trial court as to call for an exercise of this Court's power of supervision within the meaning of your General Rules. (XXXVIII-5(b)) Quite apart from the other errors noted in the decision of the Court below, this circumstance alone justifies this Court's interposition.

In a very recent case, the Circuit Court of Appeals for the Second Circuit has condemned the theory that courts are like referees or umpires in sporting events and held that appellate courts have complete power to reverse, for obvious errors of law, even where neither party brings the error to the attention of the Court. In

> *Matter of Cecilia Barnet*, 124 Fed. (2) 1005, January 7, 1942,

after stating that this court in *Ex parte Peterson*, 253 U. S. 300, at 309-310, had rejected the "sporting theory of justice" proceeds as follows:

> "That theory stems from the original function of trials in courts as substitutes for private wars. That function, to be sure, is still of prime importance (Chambers *v.* B. & O., 207 U. S., 142, 148). But we think that courts in civilized communities should do more than decide cases, one way or another, without regard to considerations of justice, merely to prevent private brawls and breaches of the peace. Government having, through its courts, established in large areas a monopoly of dispute deciding, should try, as far as possible, to decide cases correctly—both by ascertaining the actual facts, as

near as may be, and then by applying correct legal rules in an effort to do justice to the parties affected by their decisions. And not merely the parties, but the public as well, are interested that justice shall be done. The Supreme Court has said that 'a trial in court is never * * * "purely a private controversy * * * of no importance to the public." ' While the obligation to do justice does not mean, of course, that courts can act ad lib., the fact that such tribunals are called 'courts of justice' is surely not without any significance. We should no longer look upon a lawsuit as if it were 'in the nature of a cock-fight,' so that 'the litigant who wishes to succeed, must try to find an advocate who is a game bird with the best pluck and the sharpest spurs.'

"As Wigmore says, the judge should 'cease to be merely an umpire at the game of litigation. Often he is little more. This, to be sure, is in part the continuance of a tradition inherited from the spirit of gentlemanly sportsmanship which dominated the administration of British justice. But it has been intensified, instead of lessened, by the spirit of strenuous struggle and unrestrained persistence which drives the bar of our country to wage their contests to the extreme of technicality.' Wigmore also remarks that 'the common law, originating in a community of sports and games, was permeated essentially by the instinct of sportsmanship. This has had both its higher aspect and its lower aspect. On the one hand, it has contributed a sense of fairness, of chivalrous behavior to a worthy adversary, of carrying out a contest on equal and honorable terms. The presumption of innocence, the character rule, the privilege against self-crimination, and other specific rules * * * show the effect of this instinct against taking undue advantage of an adversary. The minor rules of professional etiquette * * * illustrate the same tendency even more clearly. On the other hand, it has contributed to lower the system of administering justice * * * to the level of a mere game of skill or chance * * * in the general attitude towards rules of procedure as expedients for winning the game of litigation * * * The right

> to use a rule of procedure or evidence precisely as one plays a trump card, or draws to three aces, or holds back a good horse till the home, is a distinctive result of the common-law moral attitude toward parties in litigation.' "

There is another factor in this case which we deem calls for the consideration of this Court. On the argument below petitioner cited the opinion of this Court in

Thames & Mersey Ins. Co. v. *United States,* supra

and pointed out that it had adopted the reasoning and conclusions of Lord Blackburn in

Ireland v. *Livingston,* in the House of Lords supra.

These and other decisions (*Warner* v. *Israel,* 101 Fed. (2d) 59) where relied upon as showing that under a c. i. f. contract the purchase price was a single lump sum, a unit price, and that logically it followed that a refund of the freight, the payment of which was one of the seller's obligations, necessarily belonged to the seller, just as would a refund of the insurance premiums on policies which the seller was bound to procure and pay for out of that unit price. We went further. Not only did we demonstrate that the logic of the opinions construing c. i. f. contracts inexorably required the awarding of the controverted sum to the petitioner, but we cited a very recent case decided by the Court of Kings Bench in England:

Finska Cellulosaforeningen (Finnish Cellulose Union) v. *Westfield Paper Company, Ltd.,* supra.

It appears from the report of that case that plaintiff sold pulp from Finland, c. i. f. to Leith, Scotland. The cargo was shipped and the vessel sailed in February. In April it put into a Swedish port where the Captain decided to end the voyage under the war clauses of the bill of lading. The buyers were handed the documents seriatim,—namely,

the invoice at the end of February, the insurance certificate early in March and the bill of lading in April. The buyers refused to take up the documents when tender was complete and the seller sued them for the purchase price.

In this case the invoice was only for the cost of the goods and the insurance because the buyers had already paid to the sellers on their debit note the amount of the contemplated freight. Presumably, the sellers had paid the freight to the shipowner; that is, the freight was prepaid.

The defendant-buyer counter-claimed for the freight.

After full argument the Court rendered judgment in favor of the seller for the full amount of its claim, with interest, and costs, and dismissed the counter-claim of the buyer for the freight.

The similarity of the facts of this case to the case at bar are striking. In each case there was a sale of goods, c. i. f. to be shipped from one country to another, by ocean transportation. In each case the vessels interrupted their voyages by reason of war risks and put in at ports of refuge short of destination.

In the *Finska* case the judgment granted the full purchase price to the seller by awarding the invoice cost to him and dismissed the counter-claim of the buyer for the prepaid freight. Thus in effect holding that the freight is part of the c. i. f. purchase price, notwithstanding that the voyage was not completed.

While we concede that the Circuit Court of Appeals was not required to follow an *English* case, no matter how analagous as to the facts nor persuasive as to the reasoning, we submit that in this case, and in the absence of a contrary American precedent, a due regard for the rights of the litigants as well as for its effect as a precedent, a prudent regard for a pertinent decision of an English Court would have been justified.

In international commerce and marine insurance this Court has repeatedly recognized the necessity for harmony

between the Courts of the United States and those of England.

In

Queen Insurance Co. v. *Globe Insurance Co.*, 263 U. S. 487, at p. 493

this Court said:

> "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business * * *."

In

Gulf Refining Co. v. *Atlantic Insurance Co.*, 279 U. S. 708, at p. 715

this Court said:

> "The fact that the co-insurance rule has been applied in England * * * is of weight in making a choice of two conflicting rules applicable to sea-borne commerce."

In

Aetna Insurance Co. v. *United Fruit Co.*, 304 U. S. 430, at p. 434

this Court said:

> "We granted certiorari because of the admitted conflict of the decision below with that of the Court of Queen's Bench * * *."

In the case at bar, the Court had before it cargoes originating in the Philippine Islands, sold by a Philippine concern, shipped in German vessels to an American buyer. The c. i. f. contract of purchase and sale was covered either by American law or that of the Filipino Commonwealth. While the latter has its own legal system its nationals, in many respects, are subject to American law. The bills of lading, although those of a German national, were expressly

stated to be governed by American law. The insurance policies, however, covering the cargoes against marine and war risk seemed to have been issued by an American and a British Company. One of the policies, that of the Provident Insurance Company (Rec. 35-37) is apparently of an English company resident in Manila. It states on its face that it is "CARGO—ENGLISH FORM" and on the endorsement it is stated "ENGLISH CARGO POLICY". A reading of the main clauses of both policies shows that they are on the form made familiar by Lloyds, the great English underwriting concern. Even the spelling in the American form follows the English style, i. e., "sue, *labour* and travel for" and again when fixing the rate of general average at "Five *Pounds* per centum".

Thus there were involved in the controversy before the Court the rights of the Filipino seller (petitioner), the American buyer (Respondent), the English and American underwriters, under English form of marine and war risk policies, and a German carrier. Under such circumstances it was not unreasonable to expect the Circuit Court of Appeals to follow a decision of an English Court of both original and appellate jurisdiction involving the same subject matter, in view of the course this Court has followed with respect to cases involving international trade and insurance.

We emphasize this more particularly since the United States and England are now bound, and seem likely so to continue, by the strongest diplomatic, economic, military and commercial ties which ever existed between the two nations.

As part of our present war effort vast quantities of merchandise are moved over the seven seas. These are not only military supplies in military and naval vessels, but commercial cargoes, some under the lease-lend program and others through private enterprise. Never where the hazards and perils of sea travel greater than today. All these cargoes move under bills of lading and policies of insurance

against all the risks for which policies may be obtained. Freights and premiums are high as are also the losses. It is inevitable that a flood of litigation will result from these transactions. Some cases will be in British Courts and some in the Courts of the United States. It would, we submit, be most unfortunate if there were a distinct conflict between American and English courts in the interpretation and construction of the documents so familiar now in international commerce, moving under c. i. f. contracts such as bills of lading, marine and war risk insurance policies and the other customary documents.

The considerations that were here urged; namely, that as this Court has said, no litigation is wholly a private matter; that recognized principles of justice and applicable precedents should govern the judgments of the courts; that the precedent-making value of every recorded opinion should be weighed and that analagous and persuasive opinions of other courts, even though not controlling, are entitled to great weight, are embodied in the following Canons of Judicial Ethics as published in the reports of the American Bar Association, 1937:

> "19. JUDICIAL OPINIONS.—In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.
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> "20. INFLUENCE OF DECISIONS UPON THE DEVELOPMENT OF THE LAW.—A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may

become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depositary of arbitrary power, but a judge under the sanction of law.

"21. IDIOSYNCRASIES AND INCONSISTENCIES.—Justice should not be moulded by the individual idiosyncrasies of those who administer it."

For the reasons we have stated we respectfully submit that the prayer of the petitioner should be granted.

Respectfully submitted,

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